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In the Supreme Court of the United States

October Term, 1982

WILLIAM L. BUSKIRK,

Plaintiff-Respondent,

vs.

BURLINGTON NORTHERN INC., A Corporation,

Defendant-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT, AND THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower Appellate Courts erred in refusing to follow the mandates of this Court in Railroad Employee cases by reversing a jury verdict and entering judgment as a matter of law where reasonable minds could differ due to the disputed facts, thus presenting a jury question.

2. Whether the lower Appellate Courts erred in ignoring the prior case law of this Court which case law established a defense to a cause of action under the Safety Appliance Act and which case law states the issue is for the jury to determine.

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OPINIONS BELOW

The opinion of the Fifth District Appellate Court of Illinois is reported at 103 Ill.App.3d 414, 431 N.E.2d 410 (5th Dist. 1982). The opinion is set forth in the Appendix. The decision of the Illinois Supreme Court, denying the Petition for Leave to Appeal, dated May 28, 1982, has not been officially reported.

JURISDICTIONAL GROUNDS

The Illinois Supreme Court denied the defendant's Petition for Leave to Appeal on May 28, 1982. Such denial is a final judgment or decree as the judgment of the Fifth District Appellate Court of Illinois, reversing the verdict of the jury, was thereby affirmed. Petitioner brings this prayer for a Writ of Certiorari pursuant to 28 U.S.C. § 1257(3) (1948) (amended 1970).

FEDERAL STATUTES INVOLVED

The plaintiff below brought a two-count action under the Federal Employer's Liability Act (45 U.S.C. § 51 (1970)) and the Safety Appliance Act (45 U.S.C. § 2 (1970)). The text of these statutes is set forth in the Appendix. The lower Appellate Court's construction and application of these Federal Statutes is involved in this Petition for a Writ of Certiorari.

STATEMENT OF THE CASE[1]

The plaintiff-respondent (hereinafter plaintiff), William L. Buskirk, was employed by the defendant-petitioner

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[1] For clarity, the defendant-petitioner adheres to the designation of proceedings which was adopted by the plaintiff-respondent in the lower Appellate Courts. The five "Report of Proceedings" volumes in red and clear binders and two "Report of Proceedings" volumes in blue and clear binders, not consecutively numbered, will be designated as follows:

(1) Red and clear binders are designated by the letter "T" and the page numbers.

(2) Blue and clear binders entitled "Report of Proceedings, Testimony of William Buskirk, September 18, 1980," is designated by "RB" and page number.

(3) Blue and clear binders entitled "Report of Proceedings, Testimony of William Buskirk, September 17, 1980" is designated by "RW" and page number.

(hereinafter defendant), Burlington Northern Inc., as a railroad switchman in the defendant's East St. Louis Yards, which were railroad classification yards. Railroad cars were brought into the East St. Louis Yards by incoming trains, were separated from each other and placed on different tracks for eventual connection into other trains leaving the East St. Louis Yards (RW. 7-8, 10).

Railroad cars are connected together by a device on the ends of each car known as a coupler. Each railroad car has two couplers, one on each end. The coupler is attached to a drawbar which moves in a lateral direction, or sideplay. (T. 158). On the end of each coupler is a knuckle. Automatic coupling, or connecting together of the railroad cars, is effected when the knuckles of the two railroad cars make contact, join together and lock. In order to couple, one of the knuckles must be opened prior to contact with another knuckle, (T. 331-339), and a knuckle is opened by pulling a lever which extends to the side of a railroad car. (T. 330, T. 339). Uncoupling the cars, or disconnecting them, is achieved through opening up one of the knuckles which disconnects the cars. (RW. 12). To couple automatically on impact, the automatic couplers must be in appropriate alignment, i.e., facing each other, or at a slight angle, in order to make contact and lock (T. 335, 337, 338). If the couplers are not in alignment, automatic coupling will not be effected, even if one of the knuckles is open. (T. 152, 153). If both knuckles are closed, automatic coupling cannot be effected, even if the drawbars are in alignment. (T. 338). However, even if the couplers are at a slight angle and one of the knuckles is open, automatic coupling will be effected on contact. (T. 337, 338).

On the night of the incident alleged by the plaintiff in his complaint, April 5, 1975, a co-worker had positioned

railroad cars on No. 10 track in the East St. Louis Yards, (RW. 18, 19), through a process known as "kicking," (i.e., sending cars into a track, free-rolling and unattended, by separating them from the power source, usually a small locomotive, while moving). The plaintiff was not present at No. 10 track during this "kicking" operation. The plaintiff testified that during such a "kicking" move the cars do not always couple automatically because they may not be "kicked" into the track with sufficient force to make contact with another car positioned on the track. (RW. 39). On the night of the alleged incident, the cars which had been "kicked" into track No. 10 were not coupled together. (RW. 19).

The plaintiff testified that it was his responsibility to pick up the railroad cars on No. 10 track using a switch engine. (RW. 22). He also testified on direct examination that two of the cars did not automatically couple because the drawbars were not in appropriate alignment, i.e., facing one another, due to track curvature. (RW. 36). However, on cross-examination, testimony was adduced from the plaintiff which established that the drawbars were *not* misaligned, but were facing one another in the proper position for coupling, when the plaintiff first encountered them. (RW. 89). This testimony was held to be an admission by the plaintiff under oath (T. 359, 360) which testimony the plaintiff was entitled to rebut. (T. 374-378). The plaintiff, on direct examination, testified that the misalignment of the drawbars prevented him from attempting any coupling of the two cars and that he suffered the alleged injury while attempting to align one of the drawbars on a hopper car. (RW. 26-28). However, on cross-examination, the plaintiff testified that he attempted "approximately" one coupling move, prior to his alleged injury, (RW. 95), but testified that was the only coupling attempt he made.

Again, testimony was adduced from the plaintiff on cross-examination that more than one coupling was attempted by the plaintiff prior to the alleged incident giving rise to the alleged injury. (RW. 93, 94). Again, this testimony was held to be an admission (T. 359, 360) to which the plaintiff was allowed a rebuttal. (T. 374-378). The plaintiff was alone during the entire incident.

Following the alleged incident, the plaintiff sought the help of a car mechanic, Rick Golightly, who inspected the drawbar on the hopper car in question and determined that it was not defective. (T. 137). Although rust was present on the underside of the drawbar, Golightly could not determine if the rust prevented sideplay in the drawbar. (T. 136-137). After aligning the drawbar with the plaintiff, Golightly opened the knuckle on the car in question and coupling was effected on the first attempt. (T. 138-139). Golightly left the scene and the plaintiff finished working his shift that evening.

The plaintiff brought a two-count complaint against the defendant in the Circuit Court of St. Clair County, Illinois, alleging violations of the Federal Employer's Liability Act (45 U.S.C. § 51 (1970)) and the Safety Appliance Act (45 U.S.C. § 2 (1970)). The defendant denied all operable allegations of negligence, as lodged under the Federal Employer's Liability Act, and all operable allegations of statutory violations, as lodged under the Safety Appliance Act. The case proceeded to trial on both counts.

At trial, the plaintiff introduced circumstantial evidence through the testimony of various railroad workers, that during a "kicking" move, one knuckle will be opened and one knuckle will be closed. (RW. 16-13, T. 151). The defendant introduced evidence, including scale models of the couplers in question, which established that if the couplers

are at a slight angle or are facing one another and one of the knuckles is open, automatic coupling will be effected on contact (T. 337, 338) and that if both knuckles are closed, automatic coupling cannot be effected even if the drawbars are in alignment. At the end of the plaintiff's evidence and at the close of all of the evidence, the defendant moved for directed verdicts on both counts which were denied. The plaintiff did not move for directed verdicts. Both parties argued their respective theories concerning liability to the jury, without objection. The defendant argued that the facts established that both drawbars in question were in alignment when the attempted coupling was made and that if automatic coupling was not effected on impact it was due to the closed position of both knuckles. (T. 461-465, 475, 476). Without objection by the plaintiff, the defendant argued that by reason of those facts there was no Safety Appliance Act violation which caused the injury to the plaintiff. The defendant further argued that there was no violation of any duty imposed under the Federal Employer's Liability Act as the facts established an absence of negligence on the part of the defendant. The plaintiff argued that the testimony established that under the custom and practice in the railroad industry, one of the knuckles should have been opened and one of the knuckles should have been closed at the time of impact and the coupling should have been effected (T. 484, 485). The case was submitted to the jury, which received instructions concerning the alleged violations of both Federal Statutes and the jury returned a verdict for defendant on both counts. The Circuit Court for St. Clair County, the Honorable Thomas P. O'Donnell, entered judgment for the defendant on both counts.

The plaintiff did not appeal the verdict of the jury on the count alleging a violation of the Federal Employer's

Liability Act. Instead, the plaintiff argued on appeal for the first time that the Safety Appliance Act was violated as a matter of law. The Illinois Appellate Court for the Fifth District reversed the verdict of the jury in favor of the defendant and entered judgment as a matter of law on behalf of the plaintiff. In its opinion, the Appellate Court held that it was "undisputed" that the drawbar in question "was misaligned to such an extent that it precluded coupling automatically by impact." (Appendix 2, 3). The Appellate Court did not cite the in-court testimony of the plaintiff on cross-examination where the plaintiff was held to an admission that the drawbars were not misaligned. (RW. 89, T. 359, 360).

In addition to the foregoing, the Appellate Court interpreted the Federal Safety Appliance Act and directly held that a violation was established by the "undisputed" evidence, "regardless of how the drawbar became misaligned." (Appendix, 3). The Appellate Court did not cite nor otherwise consider the substantial amount of circumstantial evidence introduced by the defendant which established a jury question that both knuckles were closed at the moment of impact. Thus, in the opinion of the Appellate Court, the defendant's theory that both knuckles were closed at the moment of impact was not a "good defense" to an allegation that the Safety Appliance Act was violated.

REASONS FOR GRANTING THE WRIT

I.

THE LOWER APPELLATE COURTS ERRED IN REFUSING TO FOLLOW THE MANDATES OF THIS COURT IN RAILROAD EMPLOYEE CASES BY REVERSING A JURY VERDICT AND ENTERING JUDGMENT AS A MATTER OF LAW WHERE REASONABLE MINDS COULD DIFFER DUE TO THE DISPUTED FACTS, THUS PRESENTING A JURY QUESTION.

A. A jury question is presented where, as here, the operative facts are in dispute and the fact finder must weigh the evidence, assess the witnesses and reach an ultimate conclusion as to which version it considers to be the truth.

The first question presented to the Fifth District Appellate Court by the appeal of the plaintiff was whether a jury question was generated concerning the plaintiff's allegations that the defendant violated the Safety Appliance Act and whether such alleged violation caused in whole or in part the alleged injuries to the plaintiff. The jury, in its role as the fact finder, weighed the conflicting testimony and the contrary inferences, and decided the question adversely to the plaintiff. The Appellate Court reversed the verdict of the jury. The preliminary question presented to this Court by this Petition for a Writ of Certiorari is whether, in abrogating the jury's determination, the Fifth District Appellate Court of Illinois refused to follow the mandates of this Court concerning the appropriate role of the jury in railroad employee cases.

The jury's function is "to select from among conflicting inferences and conclusions that which it considers most reasonable." *Tennant* v. *Peoria & Pekin Union Railway Company*, 321 U.S. 29, 35 (1944). A jury verdict which is based on conflicting evidence is not open to review, *Cafasso* v. *Pennsylvania Railroad Company*, 169 F.2d 451 (3d Cir. 1948), in cases under the Safety Appliance Act as well as the Federal Employers' Liability Act, *Pennell* v. *Baltimore and Ohio Railroad Company*, 13 Ill.App.2d 433, 142 N.E.2d 497 (4th Dist. 1957).

The Trial Court record contains conflicting evidence as to whether the defendant violated the Safety Appliance Act. On direct examination, the plaintiff testified that the two railroad cars in question did not couple automatically on impact because the drawbars bypassed one another due to track curvature. (RW. 26). However, it was the function of the jury to assess the plaintiff's basis for such testimony because the plaintiff was not present at number 10 track when the cars were kicked in by another railroad worker:

> "Q. All right. Now, then, we have got these cars, as on that evening, that were sent in here unattended, is that right?
>
> A. Yes, sir.
>
> Q. By Mr. Walters?
>
> A. By the crew, my crew.
>
> Q. Well, then Mr. Walters was the one that was pulling the pin, wasn't he?
>
> A. Yes, sir.
>
> Q. All right, and you were down here at the GM&O crossing working, sending cars over here into the train yard, is that correct?
>
> A. Into various tracks over there, yes sir." (RW. 18, 19)

The plaintiff also testified that on initially encountering the railroad cars, the drawbars were misaligned to such an extent as to prevent automatic coupling on impact. (RW. 26). The Appellate Court, in its opinion, found this testimony to be "undisputed." However, on cross examination, the jury heard testimony to the contrary:

> "Q. Again, back to your deposition, sir, page 68, line 3. Do you remember giving this answer prior to the question. 'I had a portable radio.' 'You did have a portable radio?' Do you remember this question 'And I take it that when you tried to make the joint, at least from your examination, the drawbars at the west end of the car that you had hold of and the east end of this hopper car that you were trying to hook up with were aligned in such a way that you thought the joint would be made.' Do you remember that question being asked?
>
> A. Well, sir, that question could be answered in a couple of ways.
>
> Q. I am just asking if you remember.
>
> A. I don't remember if I told him that or not.
>
> Q. Do you remember the answer being given. 'Right,' you don't remember that?
>
> A. No, sir, I don't. (RW. 89)."

The above statements were held to be an admission against the plaintiff's interests as the facts contained in the discovery deposition demonstrated that there was not a violation of the Safety Appliance Act (T. 359, 360) to which the plaintiff was granted the right of rebuttal. (T. 374-378).

Faced with such a conflict in the testimony concerning the position of the drawbars, it was the duty of the jury "to weigh the contradictory evidence and inferences, judge the credibility of the witnesses . . . and draw the ultimate conclusion as to the facts." *Tennant* v. *Peoria & Pekin*

Union Railway Company, 321 U.S. 29, 35 (1944). As further observed in *Tennant*, "it is the jury, not the Court, which is the factfinding body." Id. at 35. In the instant case, due to the conflict in the evidence concerning the position of the drawbars a jury question was presented as to whether the defendant violated the Safety Appliance Act. In substituting its judgment for that of the jury, the Fifth District Appellate Court of Illinois committed error which must be corrected by this Court. As stated in *Lavender* v. *Kurn*, 327 U.S. 645 (1946):

> "Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury." 327 U.S. at 653

In both *Tennant* and *Lavender*, (which are still the seminal cases concerning the jury's function in railroad employee cases, see *Heater* v. *Chesapeake and Ohio Railway Company*, 497 F.2d 1243 (7th Cir. 1974)) the United States Supreme Court was constrained to reverse the Appellate Court's abrogation of the jury process and reinstate the verdict of the jury.

As set forth previously, there was direct testimony that the drawbars in question were appropriately aligned at the moment of impact. However, there was a further basis for the jury's determination that defendant did not violate the Safety Appliance Act. At the end of the evidence, the jury was instructed that it was the factfinding body and it was the jury's duty to assess the credibility of the witnesses. During the cross-examination, plaintiff hedged on the testimony he had given on direct examination. (RW. 90, 91). He was evasive. His memory was faulty. In front of the jury, he completely changed his

testimony and admitted the alleged "break" in the coupling did not occur in the middle of the cut, as he had previously stated, but rather the attempted coupling when plaintiff alleged he injured himself was between the cut of cars he brought into track No. 10 (or the switch engine) and the first car on track No. 10. (RW. 92). At one point, plaintiff testified he attempted "approximately" one coupling before he was injured. Again, he was impeached with his discovery deposition. (RW. 93, 94). The impeachment was held to be an admission (T. 359, 360). Finally, the jury heard that the plaintiff had made statements at his discovery deposition which were in complete contradiction to his in-court testimony that the drawbars were misaligned when he first encountered them. Faced with all of this contradictory testimony and realizing the plaintiff was alone at the time of the alleged incident, the jury was entitled to justifiably conclude that the plaintiff's *alleged injury did not result from moving a drawbar at all.* Moreover, the plaintiff's positive direct testimony, even if not impeached, can be contradicted and discredited by circumstantial evidence, discrepancies, omissions, or inherent improbabilities.

In a case such as this, where the plaintiff was alone at the time of the alleged incident, a defendant must rely on the jury as the judges of the facts and seek to persuade the jury that the unsupported facts offered by the plaintiff are subject to intense scrutiny due to variances in testimony, implausibility of the plaintiff's version of the facts and patent contradictions, all of which were present in the instant case. The deprivation of this right to a trial before a jury of fact finders in such a case is a deprivation of all defenses. The right to such a trial by peers has been protected by this Court. The Fifth District Appellate Court of Illinois in its opinion in this matter in-

vaded the historic function of the jury. A Petition for a Writ of Certiorari has been deemed the appropriate method for correction of such inequities. *Ellis* v. *Union Pacific Railroad*, 329 U.S. 649 (1947).

B. The opinion of the lower Appellate Court is based on a misreading of the record, holding certain facts to be "undisputed" when the issues were disputed throughout the trial and each party introduced facts in support of its position.

In reversing the verdict of the jury, the opinion of the Appellate Court sets forth various "undisputed" facts. In analyzing the "undisputed" facts the Appellate Court found a violation of the Safety Appliance Act as a matter of law and thus concluded that a jury question was not presented. However, a closer inspection of the Trial Court record indicates that the "undisputed" facts which formed the predicate of the Appellate Court's opinion were hotly disputed throughout trial, thus presenting a jury question which must be restored by this Court.

In the first instance, the Appellate Court found it was "undisputed" that the plaintiff brought a switch engine into track No. 10, hooked onto the lead car, began to pull the cars out and observed that a "hopper car had failed to couple with the car in front of it." (Appendix, 2). However, the basis for the Appellate Court's determination that these facts were "undisputed" is quickly dispelled by a reference to the trial record (RW. 88, 91) where the plaintiff himself testified he could not recall whether he brought some cars with him into track No. 10 or proceeded into track No. 10 with only a small engine. More importantly, completely negating the theory that there was a "break in the coupling" (which the Appellate Court found "undisputed") was the plaintiff's admission

on cross examination that the alleged difficulty in coupling developed between the cut of cars (or the small engine) which he brought to track No. 10 and the first car in the cut of cars on No. 10 track. (RW. 92). This erroneous reading of the record by the Appellate Court led to its erroneous conclusion that two railroad cars failed to couple automatically on impact, which in turn led to its erroneous judgment.

The Appellate Court repeatedly characterized certain facts as "undisputed" which facts were either disputed or are patently incorrect. As an example, the Appellate Court found "undisputed" that the plaintiff "fell and injured his back . . ." (Appendix 2). However, at trial, the plaintiff testified he did not fall. While the issue as to whether or not plaintiff fell is not dispositive, the mischaracterization by the Appellate Court speaks clearly as to how closely the Court reviewed the trial record. (RW. 96). Furthermore, the Appellate Court found as an undisputed fact that there was "no question that the drawbar in this case was misaligned to such an extent that it precluded coupling automatically by impact." (Appendix, 3). However, in the first instance, the plaintiff testified that he was not even present when the cars were kicked into track No. 10 (RW. 22) and that sometimes cars are not kicked in hard enough to make impact. (RW. 39). The basis for the Appellate Court's finding that it was "undisputed" that the railroad cars made impact is not supported in the trial record. Finally, as to the misalignment of the drawbar, the plaintiff testified on direct examination that the drawbars were misaligned and was impeached on that point on cross examination. (RW. 89, T. 359, 360).

From the foregoing, it is clear that the Appellate Court's opinion is based on a serious misapprehension of the facts

finding certain matters "undisputed" when the facts were hotly disputed and finding other matters "undisputed" when in fact those matters were simply not true. An incorrect reading led the Appellate Court to an incorrect holding, which incorrect holding was compounded by the inaction of the Illinois Supreme Court which can only be corrected by action on the part of this Court.

II.

THE APPELLATE COURT OPINION DEPRIVES RAILROAD DEFENDANTS OF DEFENSES TO SAFETY APPLIANCE ACT CASES WHICH DEFENSES HAVE BEEN DECREED BY THE UNITED STATES SUPREME COURT.

A. The judgment of the Appellate Court is in conflict with this Court's Opinion ensuring defenses to Safety Appliance Act cases.

The Appellate Court held in its opinion that "although the parties presented several theories about what could have caused the drawbar to become so misaligned, we need not resolve that issue." (Appendix, 3). However, the defendant's theory was if in fact the drawbars failed to couple on impact (which is disputed due to conflicts in the evidence, and thus presenting a jury question, as previously set forth) then the failure to couple was caused exclusively by the closed position of both knuckles at the moment of impact. This is a defense to a cause of action based on the Safety Appliance Act. The defense is for the jury to decide. *Affolder* v. *New York, Chicago & St. Louis Railroad Company,* 339 U.S. 96 (1949). The facts in *Affolder* are strikingly similar to the facts in the instant case. In *Affolder,* as plaintiff has alleged here, two railroad cars failed to couple during a "kicking" move. In *Affolder,* as here, the defense introduced models of

the couplers and knuckles in question and relied on the testimony of an expert witness who demonstrated the operation of the couplers. In *Affolder*, as here, the defendant asserted that the reason the knuckles did not couple on impact was that both knuckles were closed at the point of impact which made automatic coupling impossible. In *Affolder*, the defendant's theory was rejected by the jury. The Federal Appellate Court reversed, holding, inter alia, that the instructions did not adequately inform the jury of the railroad's "closed knuckles" defense. The Supreme Court granted Certiorari and held that the instructions were sufficient and reinstated the verdict of the jury. In its holding, the language employed by the Supreme Court is vital to the railroad industry:

> "Of course, this assumes that the coupler was placed in the position to operate on impact. Thus, if 'the failure of these two cars to couple on impact was because the coupler on the Pennsylvania car had not been properly opened' the railroad had a good defense. The Court of Appeals also found fault with the charge on the ground that it deprived defendant of this defense. We cannot agree. The trial court directed the jury at least three times that it was for them to determine the reason why the cars separated and specifically called their attention to the testimony of the head switchman, thus emphasizing the possibility that his failure, if any, to open the coupler was the cause of the separation. Likewise, the argument of counsel, both for plaintiff and defendant, clearly reveals that the sole question with regard to this issue was whether after the couplers were placed in open or proper position, they failed to couple automatically on impact. The jury, by its verdict, resolved the question against the respondent." 339 U.S. 99-100.

In the case at bar, evidence was introduced that rather than being in a misaligned position, the drawbars in

question were appropriately aligned. Further testimony was introduced that if the drawbars are in proper alignment they will couple on impact if one of the knuckles is open. (T. 156, 157, 335). If both knuckles are closed, they will not couple, even if they are properly aligned. (T. 336). The plaintiff's own witness, car mechanic Golightly, testified that he examined the knuckles and the drawbar and found no defect which would have prevented automatic coupling. (T. 137). The jury heard evidence that the drawbars were in appropriate alignment before the plaintiff ever allegedly injured himself trying to align the drawbar. The jury heard evidence that the only way coupling will be prevented on impact under such circumstances is if both knuckles are closed. The vitality of the defense, under the authority of *Affolder*, was for the jury to decide, as both parties recognized during argument. (T. 485). The jury decided the issue in favor of the defendant. A State Appellate Court's review of that determination, based on contested facts, is therefore precluded. The opinion of the Illinois Appellate Court for the Fifth District of Illinois in this case is in conflict with this Court's opinion in *Affolder*. The lower Appellate Court expressly held that the "closed knuckle" defense which was insured by *Affolder* was not valid. This Petition for a Writ of Certiorari respectfully brings to this Court's attention the lower Appellate Court's failure to adhere to this Court's opinion in *Affolder* involving the construction, interpretation and application of the Federal Safety Appliance Act.

B. The decision of the lower Appellate Court in the instant case is in conflict with decisions of other State and Federal Appellate Courts.

With the exception of the lower Appellate Court in the instant case, the rule of *Affolder* has been correctly

interpreted by all State and Federal Appellate Courts treating the question. The rule is that a jury question is presented as to the violation of the Federal Safety Appliance Act if the couplers fail to couple automatically on impact, provided that one of the couplers has been opened prior to impact. *St. Louis South Western Railway Company* v. *Ferguson*, 182 F.2d 949 (8th Cir. 1950); *Donnelly* v. *Pennsylvania Railroad Company*, 412 Ill. 115, 105 N.E.2d 730 (1952). In *Ferguson*, the plaintiff testified that during the coupling attempt, he observed that the knuckle on one of the cars was open, which testimony was corroborated, unlike the instant case, by one of the plaintiff's co-workers. In *Ferguson*, the two cars came together on impact, but the couplers failed to automatically couple. The plaintiff was injured as a result of the failure to couple and received a jury verdict in his favor. The defendant appealed, alleging that as a matter of law there had been no violation of the Safety Appliance Act. However, the Eighth Circuit, in construing *Affolder*, held:

> ". . . A court may not declare that there has been no violation of the Act, so as to take a case from the jury, where there is substantial evidence, by direct testimony or on probative circumstances, that on the occasion of the accident *the coupler had been duly opened* but failed to couple automatically upon impact. . . . If the jury adopts plaintiff's view of the facts, that the coupler upon this specific occasion *had been duly opened* but failed to couple automatically on impact, then a violation of the Act has been established. . . ." 182 F.2d at 952 (emphasis supplied).

In *Ferguson*, the Eighth Circuit correctly determined that *Affolder* requires that the jury (not the Court) determine whether the Safety Appliance Act is violated if automatic coupling fails on impact, provided that one of the couplers is opened prior to impact. In *Ferguson*, the jury adopted

"plaintiff's view of the facts." In the instant case, the jury adopted the defendant's view of the facts. In reversing the jury verdict, the lower Appellate Court in the instant case substituted its judgment on the disputed facts for the judgment of the jury. Furthermore, in expressly holding that the defendant's theory of "closed knuckles" was not a valid defense in Safety Appliance Act cases, the lower Appellate Court also ignored both the clear language of *Affolder* and the progeny of cases decided under that opinion.

The highest Appellate Courts of various states have also interpreted *Affolder* in accordance with the plain language of the opinion. In *Donnelly, supra,* the defendant argued on appeal that *Affolder* required that the plaintiff had the burden of proof to show that the couplers and knuckles were in the open position prior to impact before a jury question was generated. The Illinois Supreme Court, correctly interpreting *Affolder,* held:

> "It seemed to us, rather, (in discussing *Affolder*) that the United States Supreme Court said that proof that the couplers or drawbars were not in proper position would constitute a good defense, but whether the defendant had proved his defense was a question of fact for the jury." 412 Ill. at 120, 105 N.E.2d at 733.

In the instant case, the defendant introduced evidence tending to establish that at the moment of impact, the drawbars in question were in appropriate alignment. Further evidence indicated that under such circumstances, the only reason coupling would not be effected on impact was due to both knuckles being closed. *Donnelly,* in correctly applying *Affolder,* recognized that a jury question was presented. The lower Appellate Court in the instant case, in holding that a jury question was not presented, failed to follow the mandate of the Illinois Supreme Court

as it had interpreted *Affolder*. See also *Finley* v. *Southern Pacific Railroad Company*, 3 Cal. Rptr. 895, 179 C.A.2d 424 (1960) and *Hallada* v. *Great Northern Railway*, 244 Minn. 81, 69 N.W.2d 673 (1955).

The *Affolder* opinion is of vital importance to the railroad industry. As observed in *Finley, supra*, that both knuckles were closed at the moment of impact is one of the few defenses to the cause of action under the Safety Appliance Act. Stripped of this defense, liability would be imposed on a railroad for the alleged "failure" of its automatic coupling equipment, even though the operation of the automatic coupling equipment is made impossible because both knuckles are closed. The *Affolder* opinion recognized such an unfair result and requires, at the least, that one of the knuckles be in an open position prior to impact for liability to attach to a defendant for the alleged "failure" of the equipment to couple automatically on impact. Railroads have defended themselves in Safety Appliance Act cases for over forty years on the basis of *Affolder*. Virtually all lower State and Federal Appellate Courts treating the question, with the exception of the instant case, have correctly applied the rule of *Affolder*. The judgment of the Fifth District Appellate Court of Illinois in the instant case contravenes this Court's opinion in *Affolder*.

This Petition for a Writ of Certiorari respectfully requests this Court clarify the conflict between the opinion in the instant case and the prior opinions of the Federal and State Appellate Courts in their respective treatments of the *Affolder* opinion.

III.

CONCLUSION

For the reasons set forth, the Petitioner respectfully requests this Court, in this Petition for a Writ of Certiorari to grant the Petition herein, accept jurisdiction of the matter, and in review of the principles applicable to the case reverse the judgment of the Illinois Appellate Court for the Fifth District and reinstate the verdict of the jury.

Respectfully submitted,

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